In the Supreme Court of the United States

October Term, 1978

No. 78-603

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant

v.

MARY BROWNE, et al.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-608

JOSEPH A. CALIFANO, Secretary of Health Education, and Welfare,

Appellant

v.

MARY BROWNE, et al.,

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

Appellee Aldo Colautti[1], Secretary of the Pennsylvania Department of Public Welfare, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final order of the District Court of the Eastern District of Pennsylvania be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

[1] Frank Beal, the Secretary of the Pennsylvania Department of Public Welfare at the time this action was filed was the named defendant representing the Pennsylvania Department of Public Welfare in the Court below. Former Secretary Beal resigned from office during the pendency of the action and was replaced by Aldo Colautti as Acting Secretary on February 16, 1978. Secretary Colautti was appointed Secretary on May 1, 1978 and should be substituted as appellee pursuant to Supreme Court Rule 48(3).

STATEMENT

This is a direct appeal from the final order of the District Court filed June 12, 1978, granting appellee Mary Browne's cross motion for summary judgment, denying appellant Califano's motion for summary judgment and declaring unconstitutional section 407 of the Aid to Families with Dependent Children subsection of the Social Security Act of August 14, 1935, 42 U.S.C.A. §607 (Supp. 1978).

Section 407 of the Social Security Act makes available the financial benefits of the Aid to Families with Dependent Children Program (AFDC) to two-parent families with children in which the father, but not the mother, is unemployed.[2] In January, 1977, this section was applied to deny benefits to Mary Browne and her family. There is no dispute that had Mary Browne been a male, she and her family would have qualified to receive benefits under section 407.

As a state participating in the federal AFDC program, Pennsylvania must conform its regulations and its distribution of benefits to the requirements of federal law. 42 U.S.C.A. §§601-04 (Supp. 1978). When a participating state makes available a financial grant to needy families who qualify under the federal requirements, the state receives federal reimbursement of a percentage of its expenditures. 42 U.S.C.A. §603 (Supp. 1978). Similarly, if a family is found ineligible for AFDC, there is no federal reimbursement regardless of

[2] The Aid to Families with Dependent Children Program—unemployed fathers—will hereinafter be referred to as AFDC-U.

the cost of the families' maintenance. In the present case, when Mary Browne was found to be ineligible for AFDC benefits as an unemployed parent because she was not a male, the family was removed from the provisional AFDC status which they were granted pending an investigation of Mr. Browne's eligibility.[3] Consequently, federal reimbursement to the Commonwealth for the financial grant to her family ceased.

In Pennsylvania, however, ineligibility for the AFDC-U program does not mean the end of financial assistance for a family. It is undisputed that Mary Browne and her family continued to receive a General Assistance grant in the same amount as their financial benefit would have been under the AFDC-U program. Although the amount is the same, the difference to the Commonwealth of Pennsylvania is significant: the General Assistance grant is paid entirely out of Commonwealth funds and the Commonwealth receives no federal reimbursement for its expenditures under this program. Thus, if Mary Browne were a male, the Commonwealth would receive reimbursement for a percentage of her financial grant; as a woman, the expense of her grant falls entirely on the Commonwealth.[4]

[3] For a more detailed explanation of the Browne family's history with AFDC, see Appellant's Jurisdictional Statement at 4 n. 1.

[4] In the District Court, appellee Secretary of Pennsylvania Department of Public Welfare, defendant below, challenged the standing of appellee Mary Browne, plaintiff below, against the Secretary in his official capacity. This position was based on two arguments: (1) Mary Browne and her family did not demonstrate that they incurred injury due to the actions of the Secretary in that the denial of AFDC benefits due to the federal requirements was recompensed by the Commonwealth in the grant

Mary Browne brought an action in the United States District Court for the Eastern District of Pennsylvania, challenging the constitutionality of section 407 on the grounds that its operation denied her due process and equal protection in violation of the Fifth and Fourteenth Amendments by discriminating against her on the basis of her sex. Appellee Secretary of Pennsylvania Department of Public Welfare supported Mary Browne and also urged that the section be declared unconstitutional. The District Court, relying upon the decisions of two other district courts which had recently decided the same questions,[5] granted Mary Browne's motion for summary judgment and declared section 407 of the Social Security Act and the implementing state and federal regulations unconstitutional in that they denied benefits to families with unemployed mothers which were granted to similarly situated families of unemployed fathers. The Court further ordered that benefits be extended to families, such as the Brownes, who qualified for AFDC-U participation but for the sex of the unemployed parent.

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of an equal amount through the Commonwealth funded General Assistance program; and (2) the Brownes could not obtain an order against the Secretary regarding the AFDC-U program since the Secretary is without power to change the requirements of the federal AFDC-U program and, similarly, would be compelled to implement any changes to the federal program, whether implemented by court order or federal initiative, in order to maintain an approvable state plan. 42 U.S.C.A. §§601-04 (Supp. 1978). The District Court rejected this argument. Appellant's Jurisdictional Statement at 4a n. 2.

[5] *Westcott v. Califano,* No. 77-222-F (D. Mass., April 20, 1978), *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 14, 1978); *Stevens v. Califano,* 448 F. Supp. 1313 (N.D. Ohio 1978), *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 15, 1978).

ARGUMENT

Three actions challenging the constitutionality of the classification by gender in section 407 of the Social Security Act were brought in and decided by District Courts in three circuits. *Browne v. Califano,* No. 77-1249 (E.D. Pa. June 12, 1978), *appeal docketed,* No. 78-603 (U.S. Supreme Ct., Oct. 10, 1978); *Westcott v. Califano,* No. 77-222-F (D. Mass., April 20, 1978); *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 14, 1978); *Stevens v. Califano,* 448 F. Supp. 1313 (N.D. Ohio 1978), *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 15, 1978). In all three cases the courts held the challenged section unconstitutional as a violation of equal protection rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.[6]

The decisions of the lower court in the present case and the two related cases are correct. In all three decisions, the lower courts, after carefully analyzing the development of equal protection law in gender classification cases, determined that the appropriate standard for review was articulated in *Craig v. Boren,* 429 U.S. 190 (1976). The test enunciated in *Craig* has been repeated and relied upon in recent opinions of this Court concern-

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[6] " '[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." ' Schneider v. Rusk, 377 U.S. 163, 168 (1964). . . . This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2 (1974).

ing instances of alleged gender discrimination under other sections of the Social Security Act. *Califano v. Webster,* 430 U.S. 313 (1976); *Califano v. Goldfarb,* 430 U.S. 199 (1976).

Under the test developed in *Craig,* a statutory classification by gender must bear a substantial relationship to the achievement of an important governmental objective. All three district courts examined the legislative history of section 407 and concluded that the section was adopted in order to: (1) extend AFDC benefits to families who are in need of assistance due to the unemployment of the principal wage earner; and (2) to reduce instances of parental abandonment of families by removing the economic incentive for desertion which existed when benefits were provided only to single-parent families. The district courts agreed that classification by gender did nothing to further these objectives; indeed, the objectives of correcting family need and parental desertion were found to be unrelated to the gender of the employed parent. In addition, the courts observed that all indications suggested the gender classification of section 407 was, in actuality, based on archaic and overbroad assumptions arising from traditional ways of thinking about women. Reliance on such unsubstantiated presumptions is forbidden by the Constitution. *Califano v. Goldfarb,* 430 U.S. 199 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973).

Appellants initially contend that the gender-based distinction apparent in the statutory section in question does not operate to the exclusive disadvantage of women and therefore should not be considered in the same category as "gender-biased" laws previously struck down by

this Court.[7] It is pointed out that the denial of benefits is equally applied and equally burdensome to women and men in the persons of the unemployed mother and her husband. This argument confuses the question by taking an overly expansive view which goes beyond the necessary limits of the classification. The statute in question grants benefits to families of men who have become unemployed after establishing the requisite work history while denying benefits to families of similarly situated women. The appropriate focus in determining the constitutionality of a statutory scheme accomplishing such a classification is on the individuals whose eligibility is determined on the basis of their sex. *See Califano v. Goldfarb,* 430 U.S. 199 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71 (1971). Incidental injury to others in addition to the female wage earner—her family, children, spouse, males or other females—does not detract from the disadvantage to the woman that was imposed because she is a woman. Rather, such tangential injury lends weight to her argument. On a theoretical level, all society can be said to suffer where irrational discrimination is allowed to flourish.

There is no distinction between the denial of benefits to Mary Browne and her family and the denial of benefits to the women workers in *Califano v. Goldfarb,* 430 U.S. 199 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1974); and *Frontiero v. Richardson,* 411 U.S. 677 (1973). In each of these cases a benefit available to the families of men was denied to the families of similarly situated women. The fact that men inherited or

[7] Appellant's Jurisdictional Statement at 8.

shared the discrimination inflicted on their wives did not prevent a finding that the classification was unconstitutional.

The argument that a classification cannot be considered discriminatory or subject to scrutiny when its burdens fall equally on members of the favored as well as the injured class has been previously considered and rejected by this Court in the context of racial discrimination. In *Loving v. Virginia,* 388 U.S. 1 (1966), the appellee argued that the equal application of Virginia's anti-miscegenation statutes to both white and black individuals removed the statutes from the category of racially discriminatory laws and limited review to the mildest standard: determining whether a rational basis can be demonstrated for prohibiting inter-racial marriages. This Court held that mere equal application of the statute to whites and blacks could not save the statutes from rigorous review under the Fourteenth Amendment and the strict scrutiny accorded laws which discriminate on the basis of race. *A fortiori,* in the present case, where unemployed women are denied grants made available to similarly situated men, even if it could be said that the burden of the statute falls with equal application on individual men and women, the Court is not required to review the case as if gender discrimination were not involved. The statutory section currently under consideration contains a classification based on sex which operates to the disadvantage of a female applicant. The fact that it affects men as well does not immunize the statute from the burden of justification which the Constitution requires of statutes drawn according to gender.

Appellants also maintain that it is constitutionally permissible for Congress to take one step at a time in proceeding toward the goal of eliminating the flaws in the AFDC-U program. That "one step" in this case extends benefits to fathers who are unemployed but not mothers who are unemployed within the meaning of the statute. According to appellant, Congress took this step because it had been made aware of the tendency of a statistically significant number of unemployed fathers to desert their families in order to qualify them for AFDC benefits.[8]

The Constitution, however, requires that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Reed v. Reed,* 404 U.S. 71, 76 (1971), quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).[9] For Congress to take the half step of addressing that portion of the problem which benefits needy men while neglecting that portion composed of needy women, simply because unemployed males and deserting fathers represent a greater percentage of the problem Congress sought to eradicate in adopting section 407, "is to make the very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Reed v. Reed,* 404 U.S. 71, 76 (1971); *see also Frontiero v. Richardson,* 411 U.S. 677 (1973).

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[8] Appellant's Jurisdictional Statement at 12-14.

[9] These cases interpreted the Equal Protection Clause of the Fourteenth Amendment. However, this analysis applies equally well to equal protection claims brought under the Fifth Amendment. *See* n. 6 *supra.*

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court and that the final order of the District Court should be affirmed.

CONCLUSION

The order of the District Court should be affirmed. Alternatively, if this Court should consider that the issues raised herein warrant plenary review, it should schedule this case for argument. As among the three related cases, *Califano v. Browne,* No. 78-603, *Califano v. Stevens,* No. 78-449 and *Califano v. Westcott,* No. 78-437, this case is particularly representative due to Pennsylvania's interest in expanding the federal program to its citizens.

Respectfully submitted,

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Dated: November 3, 1978